

No. 20151

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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UNITED STATES to the Use of AIR HANDLER, INC., a  
Corporation,

*Plaintiff, Cross-Defendant and Respondent,*

*vs.*

LEW F. STILWELL, INC., a Corporation, and UNITED  
PACIFIC INSURANCE Co., a Corporation,

*Defendants, Cross-Complainant and Appellants.*

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## APPELLANTS' OPENING BRIEF.

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N. E. YOUNGBLOOD,

425 South Beverly Drive,  
Beverly Hills, Calif. 90212,

*Attorney for Defendants, Cross-  
Complainant, and Appellants.*

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*Defendants, Cross-Complainant and Appellants.*

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## APPELLANTS' OPENING BRIEF.

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### I.

#### The Nature of the Case.

This is an action under the Miller Act by Use Plaintiff, subcontractor, against Lew F. Stilwell, Inc. as prime contractor, and United Pacific Insurance Co., as the bonding company for the prime contractor, pursuant to U.S. Code, Title 40, Sections 270a, 270b, 270c and 270d.

The Use Plaintiff seeks to recover from defendants the sum of \$34,146.06 allegedly arising out of a written Subcontract dated May 31, 1962 [Ex. 8] between plaintiff and defendant Lew F. Stilwell, Inc., as a part of which Subcontract, the prime contract [Ex. 1] dated May 18, 1962 between the United States Air Force,

as owner, and Lew F. Stilwell, Inc., as the prime contractor, was incorporated by reference, including the deadline date for completion of the overall project, August 22, 1962 [Ex. E], which Prime Contract provided for the construction, alteration or repair of a public building or public work of the United States at Norton Air Force Base in San Bernardino County, California.

The written Subcontract [Ex. 8] was negotiated, entered into and to be performed within the State of California. In paragraph IV of plaintiff's Complaint [Tr. of Rec. p. 2], filed May 6, 1963, it is alleged by Use Plaintiff "That the date the last labor was performed and material supplied by the Use Plaintiff for the said defendant Lew F. Stilwell, Inc., a corporation, was on August 27, 1962; . . ." (which is admitted by defendants in paragraph IV of their Answer to Complaint). Admittedly, the Complaint was filed after 90 days and within 1 year after August 27, 1962.

## II.

### The Issues as Pleaded.

Plaintiff alleges that it furnished certain labor and materials to defendant Lew F. Stilwell, Inc., as the Prime Contractor, in the construction, alteration or repair of a public building or public work of the United States at Norton Air Force Base, San Bernardino County, California, under a written Subcontract [Ex. 8], which work plaintiff admits it never completed.

The facts admitted by the pleadings are as follows:

1. Jurisdiction for this action, if it exists, arises out of the Miller Act, Title 40 U.S.C., Section 270(b);

2. Lew F. Stilwell, Inc. is a California corporation, having a principal office at 315 South Beverly Drive, Beverly Hills, California;

3. United Pacific Insurance Company is a Washington corporation, having a principal office within the County of Los Angeles, State of California;

4. On May 18, 1962 defendant Lew F. Stilwell, Inc., as prime contractor, entered into a contract with the Department of the Air Force, Contract No. AF 04-(607)-7169, Bldg. 477, Alter Telephone Exchange, Project NOR-111-1, Part VIII, on which defendant United Pacific Insurance Company, as surety, made, executed and delivered to the United States a bond to secure performance of said contract;

5. On May 31, 1962, at Beverly Hills, California, defendant Lew F. Stilwell, Inc. and plaintiff entered into a contract in writing, copy of which is appended to Answer to Complaint herein [Ex. A];

6. "Exhibit A" provides, among other things, that if suit is brought to enforce any of the provisions of this agreement, or to collect damages for breach thereof, the losing party shall pay to the successful party all court costs and attorney's fees of the successful party's attorney as fixed by the proper court;

7. "Exhibit A" provides, among other things, that all work shall be done to the satisfaction of the owner (United States Government-Air Force) and its engineers, and in case any dispute arises between the contractor (Lew P. Stilwell, Inc.) and the subcontractor (Use Plaintiff), the owner (United States Government-Air Force) or its authorized representative shall determine any matter of fact concerning the same, and the parties hereto shall abide by its decision;

8. "Exhibit A" provides, among other things, that subcontractor shall not be entitled to receive final payment hereunder until the entire work to be done thereunder has been accepted by the owner, and the contractor shall be under no obligation to pay the subcontractor for any work done thereunder until contractor has been paid therefor by owner;

9. Plaintiff did in fact furnish certain labor and materials to defendant Lew F. Stilwell, Inc., as prime contractor, in the construction, alteration or repair of a public building or public work of the United States at Norton Air Force Base, San Bernardino County, California;

10. During progress of the work under said project defendant Lew F. Stilwell, Inc. directed Use Plaintiff, by certain written change orders to do additional work for the additional agreed sum of \$491.35 and \$109.49, respectively.

That defendant Lew F. Stilwell, Inc. has paid the following sums under "Exhibit A";

To plaintiff by check dated August 6, 1962	\$5,296.35
To plaintiff by check dated August 24, 1962	7,803.51
To various plaintiff's suppliers	<u>56,098.92</u>
Total	\$69,198.78

11. The Use Plaintiff did not complete the work to be done and performed by it under "Exhibit A".

The issues of fact remaining in dispute are as follows:

1. Whether or not proper notice has been given by the Use Plaintiff as provided in Title 40 U.S.C., Section 270(b);



2. Whether or not Use Plaintiff was at all times referred to herein a duly licensed contractor, as required by the California Business and Professions Code:

3. Whether or not Use Plaintiff, as subcontractor, furnished either labor or materials on the project constituting the subject matter of this action within one year immediately preceding the filing of this action and, if so, when, to what extent and in what amount;

4. Whether or not the work to be done and performed under the subject contract has been accepted by the United States Air Force;

5. Whether or not the defendant Lew F. Stilwell, Inc., as prime contractor, has been paid by the owner for the claim herein sued upon;

6. Whether or not defendant Lew F. Stilwell, Inc. owes plaintiff the sum of \$34,146.06, or any other sum;

7. Whether or not Lew F. Stilwell, Inc. has done and performed the conditions precedent contained in "Exhibit A" on its part to be done and performed, and in accordance therewith;

8. Whether or not Use Plaintiff has done and performed the conditions precedent contained in "Exhibit A" on its part to be done and performed, and in accordance therewith;

9. Whether or not Lew F. Stilwell, Inc. ordered Use Plaintiff off the job on or about October 30, 1962 without cause;

10. Whether or not Use Plaintiff abandoned said project on or about August 27, 1962 prior to completion, after which Lew F. Stilwell, Inc. was required to and did obtain another subcontractor to complete

said project and, if so, if such conduct was legally justified; and

11. Whether or not Lew F. Stilwell, Inc. has sustained damages through the breach of "Exhibit A" by plaintiff in the sum of \$100,000.00, or any other sum.

The issues of law remaining in dispute are as follows:

1. Whether or not trial court had jurisdiction of the subject matter of this action under the Miller Act, Title 40 U.S.C., Section 270(b);

2. Whether or not the complaint states facts sufficient to constitute a cause of action against the defendants or either of them;

3. Whether or not Use Plaintiff, as subcontractor, has done and performed the conditions precedent contained in "Exhibit A" on its part to be done and performed, and in accordance therewith;

4. Whether or not the within action is premature, in that the entire work to be done by Use Plaintiff has not been completed, and the entire work done by the prime contractor has not been accepted by the owner, and the prime contractor has not been paid by the owner for the claim herein sued upon;

5. Whether or not defendants are entitled to recover from the Use Plaintiff all court costs and attorney's fees to be fixed by the Court herein and, if so, in what amount;

6. Whether or not defendant Lew F. Stilwell, Inc., prevented Use Plaintiff from performing "Exhibit A" and, if so, whether such prevention was justified. [Tr. of Rec. p. 26.]

### III.

#### Chronological Summary of Material Facts.

1. May 18, 1962—the prime contract [Ex. 1] was entered into between defendant Lew F. Stilwell, Inc., as prime contractor, and the United States Air Force, as a part of which defendant United Pacific Insurance Company made, executed and delivered its payment bond [Ex. 2] in the principal sum of \$112,994.50, as security. By the express terms of the prime contract [Ex. 1] this entire project was required to be completed by the general contractor on or before August 22, 1962.

2. May 24, 1962—work was commenced by the prime contractor on this project (Air Force Contract File—Ex. E), on which the date scheduled for completion was August 22, 1962, covering “Plumbing, Air Conditioning, Sheet Metal, Equipment Rooms, etc.”

3. May 31, 1962—the subcontract [Ex. 8] between plaintiff and defendant Lew F. Stilwell, Inc. was entered into, as a part of which “Exhibit No. 1” dated May 18, 1962 was incorporated by reference, including the deadline date for completion—August 22, 1962 [Ex. E].

4. June 4, 1962—the Daily Job Log [Ex. U] maintained by Marvin White, Superintendent in charge of this project, who bore the responsibility of getting the job done on time, was commenced.

5. June 21, 1962—Superintendent Marvin White ordered air cond & sheet metal on job Monday” [Ex. U], as the result of which and on the following day, Friday, June 22, 1962, plaintiff’s foreman was “on job to arrange for start Monday”, June 25, 1962 [Ex. U].

6. June 25, 1962—the Daily Job Log [Ex. U] reflects: “Air conditioning men on job doing demolition” (2 men on job), and according to “Exhibit R” these two men worked a total of 14½ hours on that date. “Exhibit R” likewise reflects that to and *including* July 9, 1962 a total equivalent to only 8 men worked on this project for plaintiff, covering an aggregate total of only 24 man hours.

7. June 23, 1962—letter from the United States Air Force to defendant Lew F. Stilwell, Inc. complained of “delinquency of 11.9% as of June 20, 1962” which endangered performance under the prime contract.

8. July 3, 1962—telegram from defendant Lew F. Stilwell, Inc. to plaintiff, attempting to induce plaintiff to send workmen to the jobsite to proceed with this project without further delay [Ex. G].

9. July 10, 1962—the Daily Job Log [Ex. U] reflects: “Plumber will hold up A.C. slabs for few days to get his drains in & backfill”.

10. July 12, 1962—the Daily Job Log [Ex. U] reflects: “Air Handlers delivered North section of A C units this A M. Are assembling same”. “Plumbing still holding back A C sheds”.

According to the testimony of William F. Sherman, Jr. on October 7, 1964 (under cross-examination), the first work performed by plaintiff's men on this project, according to Exhibit No. 5, was done by “2 sheet metal men” on July 12, 1962, but this appears to be an obvious error when compared to defendants' Exhibit R hereinbefore referred to.

11. July 16, 1962—the Daily Job Log [Ex. U] reflects: “Air Handlers started Hanging Ducts 10 A M in North Section”.

12. July 17, 1962—letter from defendant Lew F. Stilwell, Inc. to plaintiff [Ex. H] attempting to speed up plaintiff's work on this project.

13. July 20, 1962—the Daily Job Log [Ex. U] reflects: “Air Handlers on North Section are about 95% as of tonight Ducts only”

14. July 23, 1962—the Daily Job Log [Ex. U] reflects: “Air Handlers still on Ducts on North section but one about complete.”

15. July 26, 1962—the Daily Job Log [Ex. U] reflects: “Air Handlers installing ducts over present phone equipment”.

16. July 30, 1962—telegram from defendant Lew F. Stilwell, Inc. to plaintiff [Ex. F] calling to plaintiff's attention that the job completion date was August 22, 1962, and “Imperative your part of this contract is completed on the above date”, which telegram was followed up by said defendant on the following day, July 31, 1962, by letter to plaintiff [Ex. I].

17. August 8, 1962—the Daily Job Log [Ex. U] reflects: “Air Handlers putting steam on now to catch up. Crew worked 2 hours overtime tonight. They still will not make it on time”.

18. August 9, 1962—the Daily Job Log [Ex. U] reflects: “Chiller not on job”. (Plaintiff testified on cross-examination that the chiller was on the jobsite August 8, 1962 and was installed August 13, 1962).

19. August 10, 1962—the Daily Job Log [Ex. U] reflects: “Air Handlers have 4 sheet metal men on entire job. No A. C. men and no duct men”, which resulted in telegram from defendant Lew F. Stilwell, Inc. to plaintiff [Ex. I] complaining plaintiff’s installation crew not on jobsite.

20. August 13, 1962—the Daily Job Log [Ex. U] reflects: “Air Handlers are not making time they should as they are working under a reduced force”.

21. August 16, 1962—defendant Lew F. Stilwell, Inc. wrote letter to plaintiff [Ex. J] complaining about plaintiff’s delinquency on the job and plaintiff’s failure to keep a conference appointment on Monday, August 13, 1962.

22. August 21, 1962—letter from defendant Lew F. Stilwell, Inc. to plaintiff [Ex. 11] concerning charges to be made against plaintiff for required clean-up at jobsite.

23. August 22, 1962—telegram from defendant Lew F. Stilwell, Inc. to plaintiff [Ex. K] confirming conference for Thursday, August 23, 1962, on which date, according to the Air Force Contract File [Ex. E] the status of plaintiff’s work on this project was: “AC 85% complete” and “plumbing 96% complete”.

The Court is respectfully reminded that this is the date on which this entire project including *all* of plaintiff’s work, was to have been completed.

24. August 27, 1962—the Daily Job Log [Ex. U] reflects: “As for air conditioning work-job at stand-still”.

25. August 29, 1962—the Daily Job Log [Ex. U] reflects, concerning conference between Stilwell, Collins

and White, as follows: "Result is that Collins promised to start steam pipe work and pipe insulation work Thursday or Friday. Date set for his completion is Sept. 15".

26. September 6, 1962—the Daily Job Log [Ex. U] reflects: "No A C action job quiet and waiting for A C to continue" (which constitutes the last detailed entry in "Exhibit U".)

27. September 7, 1962—according to the Air Force Contract File [Ex. E] the air conditioning was only 90% complete.

28. September 21, 1962—telegram from defendant Lew F. Stilwell, Inc. to plaintiff [Ex. L] notified plaintiff that current payments under the subcontract were awaiting receipt by said defendant of satisfactory "releases". This telegram confirmed defendant's prior letter dated August 16, 1962 [Ex. J] in which plaintiff was notified that proper payroll reports would be required before any more partial payments on this project would be made to plaintiff.

29. October 5, 1962—telegram from defendant Lew F. Stilwell, Inc. to plaintiff, followed up by letter dated October 9, 1962 [Ex. 6] that by reason of plaintiff's failure to perform Exhibit 8 said defendant had no recourse but to complete and finish plaintiff's work.

30. October 12, 1962—telegram from plaintiff to Alliance Mechanical Conts. [Ex. A] and letter [Ex. D] threatening to name Alliance as co-conspirator "if you perform any work in connection with our contract. . . ."

Subsequently Utility Heating & Cooling Co. was employed by defendant Lew F. Stilwell, Inc. to complete a portion of plaintiff's work under the said air

conditioning portion of this project, which they did, and for which Utility was paid the sum of \$1699.44 [Ex. T].

31. November 7, 1962—(contrary to plaintiff's admission, as contained in the pleadings) the last work was performed on this job. (According to William F. Sherman, Jr. who so testified on cross-examination; one of the sheets comprising Exhibit 3 confirms that the entire job was 100% complete on that date).

Lew F. Stilwell testified that this job was accepted by the United States Air Force on November 7, 1962.

32. May 6, 1963—Complaint herein was filed.

33. July 22, 1963—further partial payment of \$1,-308.22 was made by the United States Air Force to the prime contractor [Ex. 3].

34. August 17, 1964—final payment hereunder was made by the United States Air Force to the prime contractor [Ex. 3].

#### IV.

##### Assignment of Errors.

1. Despite the fact that the complaint herein is filed under the jurisdiction of the Miller Act (U.S. Code, Title 40, Sections 270a, 270b, 270c, and 270d), this action is basically one for recovery under a written subcontract [Ex. 8, dated May 31, 1962], which admittedly was negotiated, entered into and to be performed within the State of California. Accordingly, construction of such contract is to be made in accordance with the laws of the forum.

*Civil Code of the State of California, Section 1646.*



2. Plaintiff cross-defendant and respondent is not entitled to any recovery herein, particularly by reason of its breach of the subcontract [Ex. 8] and by its nonperformance. According to the plaintiff's own testimony, this subcontract [Ex. 8] was not completed by plaintiff; in fact, plaintiff affirmatively attempted to prevent completion of said project by another subcontractor on work to have been done by plaintiff thereunder.

3. The within action was premature, particularly because final payment under the prime contract was not made by the Government to the prime contractor until August 17, 1964, more than one year after the filing of this action on May 6, 1963.

4. The trial court failed to charge plaintiff/cross-defendant and respondent and allow proper credit to the defendants for work done by the prime contractor, which was required to have been done by plaintiff/cross-defendant and respondent under its subcontract [Ex. 8].

5. The trial court erred in refusing to allow any evidence on the cross-complaint for alleged damages sustained by cross-complainant, Lew F. Stilwell, Inc., by reason of plaintiff/cross-defendant and respondent's failure to perform and the resulting controversy, and the inability of said cross-complainant to obtain other performance bonds which resulted directly therefrom.

V.

Argument and the Law of the Case.

Despite the fact that the Complaint herein is filed under the jurisdiction of the Miller Act (U. S. Code, Title 40, Sections 270a, 270b, 270c and 270d), this action is basically one for recovery under a written contract [Ex. 8] dated May 31, 1962, which admittedly was negotiated, entered into and to be performed within the State of California.

Accordingly, construction thereunder is to be made in accordance with the laws of the forum (*Civil Code Section 1646*).

*Section 1439 of the Civil Code of the State of California* provides:

“Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; and must be able and offer to fulfill all conditions concurrent so imposed upon him on the like fulfillment by the other party, except as provided by the next section.”

*Section 1440 of the Civil Code of the State of California* provides:

“If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party.”

It is commonplace to say that the burden rested on plaintiff to prove all of the material allegations of his complaint by a preponderance of evidence. Not only did he fail to do that, but the evidence clearly, positively and convincingly proves the nonexistence of facts requisite to plaintiff's recovery herein.

*Section 1981 of the Code of Civil Procedure of the State of California* provides:

“The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side.”

The Court is respectfully reminded that defendants' Answer to Complaint herein not only alleges that no cause of action has been stated in the Complaint, but in addition thereto defendants affirmatively allege that the Complaint was prematurely filed, which defense is reflected in the Joint Pre-trial Statement as one of the issues of law remaining in dispute [p. 7, lines 13-18]:

“Whether or not the within action is premature, in that the entire work to be done by Use Plaintiff has not been completed, and the entire work done by the prime contractor has not been accepted by the owner, and the prime contractor has not been paid by the owner for the claims herein sued upon.”

Both the general Demurrer to the Complaint and the affirmative defense urged by defendants that said action was premature should be considered together because, under the terms of the contract, the cause of

action had not yet accrued when the Complaint was filed on May 6, 1963.

Despite timely objection to the proposed Findings of Fact and Conclusions of Law, and Judgment, herein, as a part of which defendants requested specific Findings, in accordance with the evidence, as follows:

That at the time Use Plaintiff ceased work on said project it had not performed the work and furnished the materials on its part to be done and furnished, and was in default under its contract dated May 31, 1962 [Ex. 8];

That the last labor furnished and the last materials supplied by Use Plaintiff on this job were performed and supplied on or about August 27, 1962 and not October 5, 1962;

That the Use Plaintiff not only failed and refused to perform its contract dated May 31, 1962 [Ex. 8] and was in default thereunder, but in addition thereto attempted to prevent completion of the work to have been done under Use Plaintiff's contract by another sub-contractor;

That Use Plaintiff's work on this project was only 85% complete [Ex. E] on August 22, 1962 and that no further work of any consequence was performed thereon by Use Plaintiff after that date [Ex. U];

That LEW F. STILWELL, INC, was required to and did expend \$18,030.00 [Ex. S] in order to complete the work to be performed by Use Plaintiff under its contract, which sum is over and above other allowances made in this matter and for which defendants are entitled to credit;

That Use Plaintiff did abandon said project prior to completion, as the direct and proximate result of which LEW F. STILWELL, INC. sustained damages which were uncertain and incapable of calculation by the Court;

That Use Plaintiff was in default under its contract dated May 31, 1962 at the time this action was filed; and

That LEW F. STILWELL, INC. was required to and did employ another sub-contractor to complete said job, which was supplemented by work and materials done and furnished by LEW F. STILWELL, INC., as prime contractor;

all of which requested specific findings were rejected by the trial court.

## VI.

### Conclusion.

For the foregoing reasons, it is respectfully submitted that the Judgment in favor of plaintiff and against defendants should be reversed.

Respectfully submitted,

N. E. YOUNGBLOOD,  
*Attorney for Defendants,  
Cross-Complainant, and  
Appellants.*



### **Certificate.**

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

N. E. YOUNGBLOOD

